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414986—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 580

FORD MOTOR COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 404) is reported in 120 F. (2d) 175.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 5, 1941 (R. 403), and petition for rehearing was denied June 25, 1941 (R. 433). Petition for a writ of certiorari was filed on Sep-

tember 3, 1941. The jurisdiction of this Court is invoked under section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. 45, and section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner, which sold its cars in interstate commerce to dealers for resale by them to retail purchasers, was using methods of competition "in" interstate commerce when it promoted sales by dealers and its own sales to dealers by representations concerning a finance plan offered to retail purchasers of its cars.

2. Whether petitioner's representations concerning a finance plan for the retail purchase of its cars constitute "unfair" methods of competition.

3. Whether the prohibitions of the Commission's order are broader than reasonably necessary.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C., sec. 45, provides in part as follows:[1]

> That unfair methods of competition in commerce are hereby declared unlawful.

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[1] The Commission instituted this proceeding before, but concluded it after, section 5 was amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., Supp. V, sec. 45. The amendments are not pertinent to the questions presented in this case.

> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Section 4 of the Act, 38 Stat. 719, 15 U. S. C. sec. 44, provides in part as follows:

> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

STATEMENT

This case involves the validity of an order of the Federal Trade Commission entered in a proceeding under section 5 of the Federal Trade Commission Act directing petitioner to cease and desist from making certain representations which the Commission found to be misleading concerning a plan for financing retail purchases of petitioner's cars.[2]

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[2] The Commission issued its complaint against both petitioner and the Universal Credit Corporation but prior to the taking of testimony the latter executed an agreement to cease and desist from the practices complained of and the Commission thereupon dismissed the complaint as to this corporation (R. 56).

The manner in which petitioner sells and distributes its cars, the character of the representations which it made, and the order entered by the Commission are precisely the same as in the case of *General Motors Corporation* v. *Federal Trade Commission,* 114 F. (2d) 33 (C. C. A. 2nd, 1940), in which this Court denied certiorari on January 20, 1941 (No. 619, October Term, 1940). Some of the questions presented in the instant case, however, were not presented by the petition for certiorari in the *General Motors* case.

The Commission based its order on detailed findings of fact which may be summarized as follows:

Petitioner, which manufactures automobiles at Dearborn, Michigan, sells its cars to several thousand dealers located throughout the United States, who in turn sell to retail purchasers (R. 47–48). The relationship between petitioner and its dealers is established by contract, which provides that the dealer shall buy petitioner's cars at the prices fixed by it, that he shall sell such cars in the manner specified by petitioner, and that he shall operate the dealership as outlined in the contract (R. 48). Petitioner assists and promotes the sale of its cars by its dealers by wide and extensive advertising, and in other ways (*ibid.*).

The sole business of Universal Credit Corporation, which petitioner organized in 1928, consists in financing the purchase of Ford cars by petitioner's dealers and the purchase of cars by retail

customers of these dealers (R. 49). When a retail customer buys a Ford car and does not pay the full purchase price, he contracts with the dealer to pay the balance due in monthly installments, usually 12, 18, or 24 (*ibid.*). If the contract is satisfactory to Universal Credit Corporation it will, under its arrangement with petitioner, buy the contract from the dealer if the dealer so desires (*ibid.*).

What is commonly known in the automobile industry as the "six percent plan" for financing retail purchases of automobiles was first announced by General Motors Corporation in advertisements published on October 21, 1935 (R. 50). Under this plan the amount paid by the purchaser is determined by adding the unpaid balance of the purchase price at the time of purchase and the cost of insurance and multiplying the sum of these two items by one-half of one percent a month for the number of months during which payment is to be made, and the purchaser pays the total amount thus determined in equal monthly installments (R. 50–51, 57).

Following the announcement of October 21, 1935, General Motors published many thousands of advertisements featuring this "6%" plan (R. 51). In order to meet the selling advantage which General Motors gained from this plan, petitioner and all the other leading automobile manufacturers announced similar plans (R. 51–52). All of these plans were computed in approximately the same

way as General Motors' plan and all of them featured the symbol "6%" or the words "six percent" (R. 52).

Petitioner announced its plan in a full-page advertisement appearing in Sunday newspapers throughout the country on January 5, 1936, and carrying the following heading (R. 53):

FORD
ANNOUNCES $25-A-MONTH
TIME PAYMENTS
AND A
NEW UCC 6% FINANCE PLAN

The advertisement described the finance charge payable by the purchaser as follows (*ibid.*):

> Your cost for this extension of credit is only one-half of 1 percent a month on your original unpaid balance and insurance. This plan reduces financing charges for twelve months to 6 percent. For example, if you owe a balance of $400 for your car and insurance, you pay $24 for the year of credit; if the balance is $200 you pay $12. Your credit cost for one year is the original unpaid balance multiplied by 6 percent.

During the first half of 1936 petitioner published and paid for many similar advertisements and it also inserted many similar advertisements which were paid for from a fund which petitioner had collected from its dealers by levying a fixed charge for advertising on each car sold (R. 54). Some of these advertisements contained an explanatory

statement like that quoted above, but others merely referred to the "6%" plan in the manner set forth in the margin [3] (R. 54; 29, 34–35).

Under petitioner's plan the purchaser pays 6%, 9%, or 12% (depending upon the number of his monthly payments) upon the amount of his original obligation although such obligation does not remain outstanding during the period of the contract but is reduced by each monthly payment, and the financing charge actually paid by the purchaser amounts to interest at about 11½% per annum upon the declining balance of his indebtedness (R. 57, 59).

Petitioner's advertising tended to mislead and did mislead a substantial part of the purchasing public into the erroneous belief that the plan contemplates a simple interest charge of 6% per annum upon the deferred and unpaid balance of the indebtedness (R. 59). It caused and intended to cause the public to buy petitioner's cars because of this erroneous belief (R. 58–59).

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[3] "Ask your Ford dealers about the new $25-a-month new UCC 6% finance plan."

"6% Plan of Financing. Total cost of credit is only ½% monthly on orginal unpaid balance and insurance (6% for 12 months)."

"$25 a month buys any model 1936 Ford V-8. Usual low down-payment ½% per month, or 6% per year, includes insurance. Ask any Ford dealer about the Universal Credit Company $25-a-month 6% Finance Plans.

$25 a month with the usual low down-payment buys any new Ford V-8 car on new U. C. C. ½% per month finance plans."

There is a regular flow of commerce in cars manufactured by petitioner from Dearborn, Michigan, to retail purchasers in other states and petitioner's advertisement and the use of the "6%" plan furthered this interstate movement (R. 58). Petitioner's practices unfairly divert trade from competitors who do not misrepresent the cost of purchasing cars on the installment or deferred-payment basis (R. 59).

The Commission at the time it issued its complaint against petitioner issued like complaints against all the other automobile manufacturers who were advertising a "6%" plan (R. 55). All the others, with the exception of General Motors, agreed to cease and desist from the practices of which the Commission complained (*ibid.*).

Upon the basis of the foregoing findings, the Commission issued an order directing petitioner to cease and desist, in connection with the interstate sale and distribution of motor vehicles, from using the words "six per cent" or the symbol "6%" in connection with the cost of any plan for financing the purchase of cars on a deferred-payment basis, when the financing charge paid by the purchaser exceeds "simple interest at the rate of 6% per annum * * * calculated on the basis of the unpaid balance due as diminished after crediting installments as paid" (R. 60).

The Circuit Court of Appeals affirmed the Commission's order. It held that the Commission's

findings were "supported by substantial evidence" (R. 418), that petitioner's representations constituted "unfair" methods of competition (R. 413–415), that they were unfair methods of competition "in" interstate commerce (R. 416–418), and that the Commission's order was not unduly broad in scope (R. 418).

ARGUMENT

1. Petitioner, relying upon *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, urges that its representations do not constitute methods of competition "in [interstate] commerce." Its contention is grounded upon the theory that (1) petitioner's only interstate commerce is its sales to its retail dealers; (2) its dealers resell only in intrastate commerce; (3) the finance plan relates only to retail purchases from the dealers; and (4) therefore, the plan is related not to its own interstate sales but only to the intrastate sales by its dealers. The *Bunte Bros.* case, however, falls far short of sustaining this theory, and is irrelevant. In that case, the Commission sought to assert jurisdiction on the ground that the unfair competitive methods alleged to have been used, though relating solely to sales of products in the state where they were manufactured, nevertheless came within the prohibtions of the Federal Trade Commission Act since they adversely affected the interstate sales of other concerns selling in that

state. But in the instant case, it is undisputed that petitioner sells its cars in interstate commerce in competition with other manufacturers. It is also undisputed that petitioner's interstate sales to dealers are the product of, and measured by, dealer resales to the public. Accordingly, in sharp contrast to the *Bunte* case, here petitioner's unfair methods were used not to promote sales solely within the state of manufacture but to promote its own interstate sales, which, in turn, were in competition with the interstate sales of other manufacturers.[4]

Petitioner's contention that because its only interstate sales are to dealers and because its methods of competition related only to intrastate retail purchases, petitioner was not within the prohibitions of the Federal Trade Commission Act, is foreclosed

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[4] Petitioner's own statement of the facts shows that representations concerning the cost of financing retail purchases have a potent and immediate effect upon the interstate competition of automobile manufacturers. The petition for certiorari (pp. 5–6) states that the various manufacturers that adopted the "6%" financing plan following its original announcement by General Motors "did so *to meet the competition created by the beneficial features of the plan* * * * and because retail purchasers were requesting dealers for something equally as good." Petitioner's general sales manager (R. 69), testifying concerning the reasons for petitioner's adoption of the "6%" plan, stated that "it would have been rather difficult to sell Ford cars through our dealers to the public without a similar plan" (R. 103–104).

by *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, and *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304.[5] In both these cases the interstate sales were to retailers only and the unfair methods of competition related only to the retailers' resales to consumers.[6] In the *Winsted* case, the Court, in holding that the respondent's misrepresentations were subject to the prohibitions of the Act, said (p. 494):

> The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods,

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[5] Petitioner seeks to distinguish the *Keppel case* on the ground that there the machinery for effecting the unfair competition was a part of the interstate shipment. This circumstance was not a factor significant to the decision. While there must be competition in interstate commerce promoted by unfair means, the unfair means need not be the subject of an interstate transaction. Nor would a different view of the statute aid petitioner. It published its misleading representations in newspapers throughout the country and therefore gave them an interstate circulation. Petitioner's action was the same, in substance, as if it had prepared a placard setting forth its representations concerning the "6%" finance plan and had attached this placard to each car shipped to its dealers, for display by them to prospective customers.

[6] See *Keppel & Bro., Inc.* v. *Federal Trade Commission*, 63 F. (2d) 81, 84 (C. C. A. 3); *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 490, 494.

thereby lessening the market for the honest product.

The facts of the present case bring it even more squarely within the ban of the statute since petitioner did not merely put into the hands of its dealers an "unlawful instrument" but itself employed such instrument.[7]

2. Petitioner contends that its representations concerning the "6%" plan were not "unfair" methods of competition. This contention is grounded for the most part upon the same argument advanced in the petition for certiorari in the *General Motors* case (No. 619, October Term, 1940), namely, that the representations were not inherently false and would not deceive an intelligent or inquiring purchaser.

It is unnecessary to repeat in full the Government's argument in its brief in opposition (pp. 14–17) in the *General Motors* case. We call attention, however, to the statement in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81, that the test to be applied in determining whether a representation is unfair under the

[7] Deceptive representation concerning the price of a product is as much an "unlawful instrument" of competition as deceptive representation concerning its nature. When a product is usually sold on credit, misrepresentation concerning the cost of the credit extended to the purchaser is the equivalent of a misrepresentation concerning purchase price.

Trade Commission Act is its "capacity to deceive," not whether it constitutes "fraud as understood in courts of law," and to the holding in *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116, that the prohibition against unfair methods of competition includes those which avail to capture the trade of only the ignorant or gullible.

Petitioner appears also to urge that the Commission's findings as to the deceptive effect of petitioner's representations are not supported by evidence. We submit that there is, as found by the court below (R. 418), substantial evidence in support of the findings.[8] Petitioner relies upon evidence, absent in the *General Motors* case, that two governmental agencies, the Federal Housing Administration and the Electric Home and Farm Authority, had issued circulars using the word "interest" or "discount" in reference to finance plans computed in substantially the same way as petitioner's. But such evidence did not compel a different conclusion, from that reached by the Commission, and the weight to be accorded to it, as to all the other evidence in the case, is for the Commission to determine.

3. Petitioner contends that the prohibitions of the Commission's order go beyond the charge made in the complaint. The facts appear to furnish no

[8] R. 229, 245–246, 262–263, 302–303, 312, 316–318, 347–348, 374.

basis for this contention. The complaint charges that the symbol "6%" which petitioner stressed in its advertising misled purchasers into the erroneous belief that the financing charge was interest at 6% per annum on the declining balance of their obligation (R. 30). The order prohibits use of this symbol or the words "six percent" in connection with any plan for financing retail purchases of automobiles if the financing charge in fact exceeds interest at 6% per annum calculated on the declining balance of the purchaser's obligation.

Petitioner also urges that the order, instead of prohibiting use of the 6% symbol in the foregoing manner, should have merely prohibited such use when not accompanied by explanatory language. Where it is shown that outright prohibition of words having deceptive effect would require abandonment of a trade name having valuable good will, its continuation, accompanied by qualifying words sufficiently preventing deception, will sometimes be permitted. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217–218. But in the instant case there was no showing of exceptional circumstances warranting such a modification in the Commission's order.

CONCLUSION

The decision below is clearly correct. It presents no conflict and no unsettled question of statutory interpretation. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941